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THE PRESIDENT AND THE CAA: MANDATORY AND DISCRETIONARY APPOINTMENTS

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I Introduction

1. In Seychelles the appointment of judges and other positions requiring independence falls under the responsibility of the President of the Republic and of the Constitutional Appointments Authority (CAA). This article will examine the relationship between the President and the CAA.
2. A common assumption in Seychelles is that the role of the CAA lies in recommending judges and other constitutional office holders to the President. Since this is a mere recommendation, the common assumption goes, the President has a discretion to refuse to appoint the people recommended by the CAA. This article will argue that this view is incorrect. In most cases the President does not have a discretion in appointing judges and other office holders. His role is there similar to that of Her Majesty The Queen in appointing judges in the UK. It is only in limited circumstances that the CAA's role is merely to recommend. In those cases the President is free to reject the CAA's recommendation.
3. Section II argues that the use of words such as "recommend" or "propose" does not say anything about whether the President has a discretion or not. Section III argues that in a number of instances, including judicial appointments, the President must give effect to the CAA's proposal. Section IV argues that in those cases the CAA is not required (but is free) to give the President a list of candidates to choose from. Section V considers instances where the President has a discretion. Section VI considers two somewhat ambiguous instances where it is argued that the President does not have a discretion.
4. Section VII argues that the division between discretionary and mandatory appointments is not arbitrary but actually serves a purpose: protecting independence. Section VIII argues that the only instances where they President may refuse to appoint (in mandatory instances) is if the CAA has acted *ultra vires*. Section IX argues that in mandatory instances the President is bound by the length of time given by the CAA but that in discretionary instances he is free. Section X concludes.

II Irrelevance of the use of "recommend"

5. The fact that in the Constitution the word "recommend" is used does not in itself mean that the President has a discretion. This can be seen from the following Articles.

6. Removal of judges

Article 134(3): "Where, under clause (2), the tribunal recommends that a Justice of Appeal or Judge ought to be removed from office, the President shall remove the Justice of Appeal or Judge from office."

7. Removal of officers

Article 165(4): "Where under clause (3), a tribunal recommends that an officer to whom this Article applies ought to be removed from office, the President shall remove the officer from office."

8. Removal of commissioners

Article 166(2): "A Commissioner shall be removed from office by the President where the question of the removal of the Commissioner from office has been referred to a tribunal appointed under clause (3) and the tribunal has recommended to the President that the Commissioner ought to be removed from office."

9. In all those case although the tribunal "recommends" the President is under an obligation to give effect to the "recommendation" of the tribunal. This is because "shall" is used.

10. The word propose does suggest that the person the proposal is made to can reject it, although the permissibility of a rejection is less clear than if "recommend" is used. *A fortiori*, it follows that in the context of Constitutional appointments the fact that the word "propose" is used does not necessarily mean that the President has a discretion (since in the above case "recommend" was used but there is no discretion).

III Mandatory instances

11. So in the following the use of "propose" does not necessarily mean the President has a discretion:

12. Justices of Appeal

Article 123: "The President shall, by instrument under the Public Seal, appoint the President of the Court of Appeal and other Justices of Appeal from candidates proposed by the Constitutional Appointments Authority."

13. Judges of the Supreme Court

Article 127: "The President shall, by instrument under the Public Seal, appoint the Judges and Masters of the Supreme Court from candidates proposed by the Constitutional Appointments Authority."

14. Other officers

Article 62(3): "Appointment to an office declared by the President not to be an office in the public service shall be made by the President from candidates proposed by the Constitutional Appointments Authority."

15. Attorney General

Article 76(1): "There shall be an Attorney-General who shall be appointed by the President from candidates proposed by the Constitutional Appointments Authority."

16. Electoral Commissioner (original Constitution)

Article 115(1): "There shall be an Electoral Commissioner who shall be appointed by the President from candidates proposed by the Constitutional Appointments Authority for a term of office of not more than seven years."

17. Ombudsmen

Article 143(1): "There shall be an Ombudsman who shall be appointed by the President from candidates proposed by the Constitutional Appointments Authority."

18. Auditor-General

Article 158(1): "There shall be an Auditor-General who shall be appointed by the President from candidates proposed by the Constitutional Appointments Authority."

19. Once again the word "propose" does not mean there is a discretion and the use of "shall appoint" and "shall be appointed" means it is not discretionary but mandatory. The President cannot refuse to appoint someone proposed by the CAA.

IV Must the CAA give a list which the President can choose from?

20. All the above Articles state "candidates proposed". Does this mean that the CAA is obliged to propose more than one candidate (for a single vacancy) and the President can choose which one to appoint? It is submitted that it does not.

21. Schedule 2 para 2 of the Constitution states: "In this Constitution, unless the context otherwise requires, words in the singular shall include the plural and words in the plural shall include the singular."

22. Hence, the CAA is not required to give the President a list unless the context requires otherwise. In the case of Articles 123 (Justices of Appeal), 127 (Judges of the Supreme Court) and 62(3) (other officers) the plural was used because those Articles concerned the appointment of many individuals. So the context does not require that the CAA proposes more than one person for the post of the judge.

23. Insofar as the other Articles are concerned the position is less clear. The plural was used as this was the only possibility with the syntax that was adopted (try constructing the same sentence but with the singular, you cannot). The question then is, was this particular syntax adopted because it was intended that the CAA proposes more than one candidate from the President to choose from? I do not know, but the effect of Schedule 2 para 2 is that the CAA is free to propose only one candidate unless the context requires otherwise. There is no evidence that it does. So the CAA is free to propose just a single candidate or give a list.

24. This is confirmed when one looks at the provision of the original Constitution regarding the appointment of the Chairman of the CAA and of the PSAB.

25. Chairman CAA (original constitution)

Article 140(2): "Where the two members of the Constitutional Appointments Authority appointed under clause (1)(a) are unable to agree on the appointment of the third member and Chairman of the Authority, the two members shall, within fourteen days after the end of the period specified in clause (1) (b) , propose a list of not less than two and not more than three candidates for the office of member and Chairman of the Authority to the President and the President shall appoint one of the candidates proposed as member and Chairman of the Authority."

26. Chairman PSAB (original constitution)

Article 148(2): "Where the two members of the Public Service Appeal Board appointed under clause (1) (a) are unable to agree on the appointment of the third member and Chairman of the Board, the two members shall, within fourteen days after the end of the period specified in clause (1)(b), propose a list of not less than two and not more than three candidates for the office of member and Chairman of the Board to the President and the President shall appoint one of the candidates proposed as member and Chairman of the Board."

27. These were later amended in 1996 but the emphasised section remains unchanged.

28. In the Constitution, when it was intended that a list be sent to the President for him to choose from this was made explicit.

29. This is further confirmed when one looks at the new provisions regarding the Electoral Commission. Article 115A(1) states: "The Commission shall consist of a Chairperson and four Members all of whom shall be appointed by the President selected from seven candidates of proven integrity and high repute, proposed by the Constitutional Appointment Authority constituted under Article 139 of the Constitution." This provision explicitly gives the President the right to choose five from a list of seven.

30. There is nothing explicit in the provisions concerning the Attorney-General, the Ombudsmen, the Auditor-General and (in the original Constitution) the Electoral Commissioner.

31. The Constitution must be read as a whole: Sch 2 para 8(b). The fact that in some cases the requirement of a list was made explicit but that in others nothing explicit was said must mean that in those later cases there is no obligation to give a list of names.

32. Therefore, the CAA is free but not obliged to give the President more candidates than there are vacancies and the President cannot refuse to appoint someone proposed by the CAA (even if the CAA proposes only one person).

V Instances where the President has a discretion

33. In all the following the President clearly has a discretion to refuse to do what the CAA wants.

34. Advisory Committee

Article 61: "There shall be an advisory committee on the power of pardon under Article 60 which shall consist of not less than three and not more than five persons as may be appointed for a term of seven years by the President from candidates proposed by the Constitutional Appointments Authority."

35. Acting Justice of Appeal

Article 124(2)(d): "the President may appoint a person from candidates proposed by the Constitutional Appointments Authority to act as Justice of Appeal until ..."

36. Acting Judge of SC

Article 128(2)(d): "the President may appoint a person from candidates proposed by the Constitutional Appointments Authority to act as a Judge"

37. Renewal of term

Article 131(4): "The President may, on the recommendation of the Constitutional Appointments Authority in exceptional circumstances, appoint a person who is not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal or Judge for a second term of office, whether consecutive or not, of not more than seven years."

38. Removal of judges pending

Article 134(4): "Where under this Article the question of removing a Justice of Appeal or Judge has been referred to a tribunal, the President may suspend the Justice of Appeal or Judge from performing the functions of a Justice of Appeal or Judge, but the suspension -

- a. may, on the advice of the Constitutional Appointments Authority, be revoked at any time by the President;
- b. shall cease to have effect if the tribunal recommends to the President that the Justice of Appeal or Judge ought not to be removed from office."

39. In addition, as stated above, in cases concerning the Chairmen of the CAA and of the PSAB and the Electoral Commission the President has a limited discretion. He must appoint someone from the list he is given but he cannot refuse to appoint the requisite number of people.

VI Some ambiguous provisions

40. The following two provisions are somewhat ambiguous as to whether the President has a discretion or not.

41. Acting President of the CA

Article 124(1)(c): "the functions of the office of President of the Court of Appeal shall be performed by a justice of Appeal appointed for the purpose by the President from Justices of Appeal proposed by the Constitutional Appointments Authority."

42. Acting CJ

Article 128(1)(b): "until the person holding that office has resumed the functions of that office, as the case may be, the functions of the office shall be performed by a Judge appointed by the President from Judges proposed by the Constitutional Appointments Authority."

43. The two above do not contain either "the President may" or "the President shall". Furthermore they are found in two Articles which also contain a discretionary power of appointment (for acting Justices of Appeal and acting Judges respectively). Nevertheless it is submitted that they are mandatory.

44. Firstly, the "shall" of "shall be performed by" applies also to "appointed by the President".

45. Secondly, the administration of Justice requires that there be a Chief Justice and a President of the Court of Appeal. This is unlike Acting Justices or Acting Judges, those are not essential. If these Articles were interpreted as discretionary then there could be a situation where the President keeps on refusing to appoint anyone and so Seychelles is left with no Chief Justice or President of the Court of Appeal. Therefore, those Articles are mandatory.

VII How it all fits together

46. Why is it that some provisions are mandatory and others are discretionary? The purpose of the having an independent body, the CAA, involved in appointments is to ensure that political considerations do not influence the appointment to positions which require independence.

47. When independence is not required or the threat to independence is minimal the provisions are discretionary. Otherwise they are mandatory. I will show this by taking the discretionary provisions in turn.

48. Advisory committee

As the name states this a committee to advise the President on the exercise of a power which is under his prerogative, the power of pardon. There is no need for the committee to be particularly independent. Hence a discretionary power.

49. Acting Justices and Judges

These positions are temporary and not permanent. Furthermore the President must still appoint someone proposed by the CAA. This preserves independence. All the President can do is to refuse to make someone an Acting Justice or Judge. The threat to independence is minimal.

50. Renewal of term

The person in question would have been appointed to his first term using a mandatory provision. That person is then independent. Further the CAA must still recommend the re-appointment of that person. The threat to independence is then in such cases minimal.

51. Removal of judges pending

This deals to a case where a judicial officer is being investigated by an independent tribunal appointed by the CAA. The judicial officer has not yet

been found guilty, but the President has suspended him during the investigation. The threat to independence created by the fact the President can ignore the CAA's advice to revoke the suspension is once again minimal.

VIII When may the President refuse to appoint despite the exercise of a mandatory provision?

52. Only if the CAA acted *ultra vires* in its proposal. In such a case the President has the duty to refuse to appoint. This is because the CAA's proposal is then a nullity: *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147. If in those circumstances the President were nevertheless to appoint the person proposed then he would be acting *ultra vires* and hence unconstitutionally. Hence he is under a duty not to appoint if the CAA acted *ultra vires*.

53. There is of course nothing improper (or, at any rate, nothing unlawful or unconstitutional) with the President, on being told by the CAA who its candidate is, asking the CAA to reconsider the matter. However, the CAA is perfectly entitled to insist on its proposal. The President is then obliged to appoint.

54. If the President refuses to do so then it is open to the CAA, the person proposed or anyone else having *locus standi* to apply to the court for the writ of mandamus to force the President to appoint the person.

IX Length of term

55. In the recent case of *James Michel et al and Justice Domah v Viral Dhanjee* SCA 5 and 6/2012 the majority of the Court of Appeal held that, in a case concerning reappointment under Article 131(4) (which as argued above is discretionary), the President could appoint for a longer term as the one recommended by the CAA.

56. Twomey J stated at [29]: "[I]t is the President and not the CAA who appoints and decides on the length of the term of appointment. The CAA's duties are to recommend in exceptional circumstances for reappointment the non-Seychellois judge. It is not their prerogative to dictate to the President how long the term should be."

57. I believe this is correct. This, however, does not apply to instances where the President has no discretion to re-appoint. In those cases the President's role is, essentially, one of rubber stamping (though he is free to ask the CAA to reconsider). It is the CAA that really does the appointing and so the President is bound to give effect to the term proposed by the CAA (of course, once again, he is free to ask the CAA to reconsider).

X Conclusion

58. In most instances, including in particular cases about appointment of judges, the President has no discretion to refuse to appoint a person proposed by the CAA, unless the CAA has acted *ultra vires*. In addition, the President has to appoint for the length of time suggested by the CAA. Furthermore, the CAA does not have to give him a list of people to choose from.

59. If the President refuses to appoint, then the courts can issue a writ of mandamus forcing him to do so. The President may, however, ask the CAA to reconsider but the CAA is entitled to insist on its initial proposal.

60. There are limited cases where the President has a discretion about whether to act on the CAA's proposals. These, however, all concern cases where independence is not required or the threat to independence is minimal. All other instances are mandatory or give limited discretion to the President. This is done to protect independence.

61. This conclusion is consistent with the fact that the CAA is named the Constitutional Appointments Authority and not the ConstitutionalRecommendation Authority.